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No. 83-1033

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SATELLITE TELEVISION & ASSOCIATED RESOURCES, INC.,
Petitioner,

v.

CONTINENTAL CABLEVISION OF VIRGINIA, INC., *et al.*,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly considered the legality of limited exclusivity provisions in contracts between a cable television company and apartment owners under the Rule of Reason of Sherman Act § 1.

2. Whether the Court of Appeals correctly held that the exclusivity provisions were lawful under Sherman Act § 1, where (a) the petitioner failed to sustain its burden of proving the relevant product and geographic markets; (b) the exclusivity provisions did not substantially lessen competition in any relevant market; and (c) the exclusivity provisions made it possible for respondents to provide competition which would not otherwise have existed.

3. Whether the Court of Appeals correctly held that respondents had not violated Sherman Act § 2, where the petitioner (a) failed to prove the relevant market; (b) made no showing of monopoly power or probability of achieving monopoly power in any relevant market; and (c) stipulated that respondents' decision to institute limited exclusivity provisions was a good faith business judgment.

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CONTINENTAL CABLEVISION OF VIRGINIA, INC., *et al.*,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

This brief is submitted on behalf of respondents Continental Cablevision of Virginia, Inc., Continental Cablevision of Richmond, Inc., and Continental Cablevision, Inc.[1] (referred to collectively hereinafter as "Continen-

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[1] In accordance with Rules 34.1(b) and 28.1 of the Supreme Court Rules, respondents note as follows:

(1) The respondents in this case are Continental Cablevision of Virginia, Inc., Continental Cablevision of Richmond, Inc., and Continental Cablevision, Inc.

(2) Dow Jones & Company owns approximately 24.7 percent of the stock of Continental Cablevision, Inc. No other corporation owns more than 5 percent.

(3) Subsidiaries (other than wholly-owned subsidiaries) and affiliates of Continental Cablevision, Inc. include Continental County Cablevision, Inc., Big Valley Cablevision, Inc., Continental Cablevision of Morton Grove, Inc., Continental Cablevision of Springfield, Inc., Cablevision Service Co., Chan-

tal") in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on August 11, 1983.

OPINION BELOW

The opinion of the Court of Appeals is officially reported as *Satellite Television and Associated Resources, Inc.* v. *Continental Cablevision of Virginia, Inc.*, 714 F.2d 351 (4th Cir. 1983).

STATEMENT OF THE CASE

Continental and the petitioner, Satellite Television & Associated Resources, Inc. ("STAR"), are both involved in providing pay television services in the Richmond metropolitan area. Continental offers cable television service to houses, apartments, schools, hotels, motels, and other locations. Record ("R.") 47 (Joint Stipulation ("J.S.") 4).[2] STAR, through an affiliate,[3] provides a single channel of programming that is transmitted through super-high frequency microwave signals. R. 64

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nel One, Inc., Stellar Continental Cable, Inc., Vision Cable Communications of Staten Island, Inc., Continental Cablevision of Winchester, Inc., Commonwealth Cablevision Corporation, Rockingham County Cablevision, Inc., Continental Cablevision of Brockton, Inc., Continental Cablevision of Needham, Inc., and Continental Cablevision of Richmond, Inc.

[2] Record citations in the form "R. ——" refer to page numbers in the Joint Appendix filed with the Court of Appeals. Contained within this record of trial is the "Joint Stipulation", a set of stipulated facts on liability which, together with twelve volumes of documents and testimony, was submitted to the trial court for the purpose of obtaining a decision on the merits with respect to liability.

[3] STAR itself does not directly provide pay television service, but a subsidiary of STAR is the corporate general partner of RST Ltd., a limited partnership which operates the single-channel pay television service in the Richmond area. R. 49 (J.S. 11, 12).

(J.S. 71). Continental and STAR compete with a variety of entertainment businesses, including broadcast television, movie theaters, video cassettes and disks, spectator events, radio, theatres, phonographs, and sports activities. R. 56-57 (J.S. 36-38).

At issue in this case is the legality of limited exclusivity provisions formerly contained in agreements between Continental and certain Richmond-area apartment building owners. These provisions gave Continental, in exchange for Continental's agreement to wire an apartment building for cable television, an exclusive right for a limited time [4] to provide pay television service in that building.

The purpose and effect of the exclusivity provisions were to help Continental overcome the otherwise unacceptable business risks associated with installing cable television service in apartment buildings. As compared to wiring single-family dwellings, wiring apartment buildings is extremely costly. R. 67 (J.S. 80). It requires extending lines underground, drilling between floors or units, and snaking wires throughout the buildings to every unit, whether or not its resident is a subscriber. *Id.* These costs and difficulties are magnified in the Richmond metropolitan area by the high incidence of garden-style apartments, which because of their physical layout are especially expensive and risky to wire. R. 68 (J.S. 83).[5]

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[4] Continental periodically reviewed the exclusivity provisions and altered them, by shortening the term of exclusivity, to make them commensurate with perceived financial risks. R. 72 (J.S. 98), 429-430, 443-445. None was in effect for longer than twenty-three months. R. 71, 73 (J.S. 98, 101).

[5] Continental also determined that its expenses would be increased because of a greater loss of equipment in apartments than in single-family dwellings, a higher "skip rate," and a higher turnover rate which would result in increased expenses for disconnecting and reconnecting the service. R. 69 (J.S. 86).

Most cable companies simply refuse to incur the high cost of wiring apartment buildings. R. 68 (J.S. 82). STAR's president, Richard Lubic, who had spent years in the cable business, testified that it would be "folly" for any cable company to attempt to wire major apartment buildings. R. 470. "[M]ost cables do not go after the multi-family housing because it is too expensive for them to wire." R. 466. As a result, according to Lubic, "very few multiple housing units are served by any form of cable television in the country." R. 469.

Thus, Continental was confronted with the business decision of whether to forego serving apartments or to embark upon the extremely expensive and economically perilous course of wiring the apartment buildings. R. 70 (J.S. 89). Continental concluded that it would be economically feasible to bear the cost of wiring apartment buildings only if it could negotiate an exclusivity provision which would afford Continental a reasonable chance of recovering its costs of installation. R. 70 (J.S. 90). Continental carefully considered several options other than the use of exclusivity provisions, R. 69 (J.S. 86), and concluded that these options were infeasible and unsatisfactory. *Id.*

Continental decided, therefore, to seek limited exclusivity provisions in contracts with apartment owners where Continental paid the cost of wiring. R. 70 (J.S. 90).[6] STAR has stipulated that Continental's decision to seek limited exclusivity was "a good faith business decision." *Id.* STAR has also stipulated that "but for the exclusivity provisions, [Continental] would not have wired MDUs [multi-dwelling units]." R. 70 (J.S. 90).

The first exclusivity provisions went into effect in July 1978. None was in effect after June 1980. R. 71, 73 (J.S. 93, 101). At no time did the exclusivity provisions

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[6] Continental offered to delete the provisions where apartment owners agreed to pay the cost of wiring. R. 71 (J.S. 93, 95).

affect more than eight percent of the dwelling units in the Richmond metropolitan area. R. 73-74, 75 (J.S. 102, 105).

SUMMARY OF ARGUMENT

The arguments presented by STAR in its petition address primarily factual issues, such as whether Continental would in fact have provided cable television service to apartment buildings absent the exclusivity provisions. These factual issues have long since been settled, not only by the determinations of the courts below, but also by STAR's own stipulations at trial. There is no justification for relitigating the same factual issues before this Court.

The legal arguments in STAR's petition fail to demonstrate any respect in which the Court of Appeals' decision was incorrect or out of line with prior antitrust decisions of other federal courts. The Court of Appeals correctly held (a) that exclusivity provisions are properly considered under the Rule of Reason of Sherman Act § 1; (b) that STAR's failure to prove either a relevant product market or a relevant geographic market was fatal to STAR's claims under Sherman Act §§ 1 and 2; (c) that STAR's failure to show that Continental had market power or that Continental had the intent to monopolize any market was also fatal to STAR's Sherman Act § 2 claim; (d) that exclusivity provisions are not illegal "tying" arrangements; and (e) that Clayton Act § 3 is inapplicable to the sale of services such as television programming. All aspects of the Court of Appeals' holding are soundly reasoned and fully supported by antitrust authority. STAR's petition is without merit and should be denied.

ARGUMENT

1. The contentions advanced by STAR are predominantly factual in nature, and are contradicted by STAR's own stipulations at trial.

STAR's petition is, in predominant part, a resurrection of factual issues long since settled by stipulation of the parties or findings of the trial court. The petition addresses at some length, for example, the legitimacy of Continental's business justification for seeking exclusive contracts with apartment owners, Petition ("Pet.") 5-7 and 11-13, and the allegedly adverse effect which those contracts had on STAR's operations, *id.* at 3-4 and 7. The petition proffers once again STAR's discredited factual claims as to the percentage of market foreclosure allegedly resulting from the exclusivity provisions, *id.* at 4, and complains of the "restrictive definition of the relevant market" adopted by the trial court, *id.* at 9. *See also id.* at 4, n.5.

STAR's persistent effort to relitigate facts has no place in an appellate proceeding. All of the factual contentions which STAR advances in its petition to this Court were presented to and fully considered by the trial court.[7] STAR presented all of the same factual contentions to the Court of Appeals, both in the initial hearing of its appeal and in its petition for rehearing *en banc*. Both the trial court and the Court of Appeals determined that STAR's version of the facts was without support in the record, and was contradicted in numerous respects by STAR's own stipulations at trial. On all of these factual issues STAR has had its day in court, and is not entitled to another.

Nothing in STAR's factual arguments, moreover, detracts in any way from the central, dispositive facts of

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[7] As the Court of Appeals held, the District Court's judgment in this case was based on a "full trial". Appendix to the Petition ("Pet. App.") 4a. STAR does not contend otherwise.

this case, all of which are based on STAR's own stipulations and admissions. Those facts, as found by the trial court, conclusively establish that the exclusivity provisions employed by Continental, a newcomer to the Richmond market, "had a beneficial rather than a harmful effect on competition within the market." R. 151; Pet. App. 26a. Based upon the stipulations and STAR's admissions, the trial court found:

> Without exclusivity, plaintiff would have been met with no competing pay television service to apartment units; apartment dwellers could have had STAR or nothing. With exclusivity, apartment owners had a choice between defendants' service and plaintiff's service. [R. 151; Pet. App. 26a.]

In reaching its conclusion, the trial court relied on the parties' stipulation that, absent the exclusivity provisions, Continental would not have been able to provide service to apartment units because doing so would have involved an unacceptable business risk. R. 70 (J.S. 88, 90). STAR's petition presents no basis whatsoever for overturning the trial court's findings of fact.

2. The decision of the Court of Appeals is fully consistent with and supported by prior antitrust decisions of this Court and other federal courts.

The decision of the Court of Appeals in this case was based on five legal conclusions, each firmly grounded in hornbook principles of antitrust law. Those legal conclusions were: (1) that the validity of exclusive dealing contracts is properly considered under the Rule of Reason of Sherman Act § 1, not the *per se* rule of illegality; (2) that STAR's failure to sustain its burden of proving the relevant geographic and product markets was fatal to its claims under Sherman Act §§ 1 and 2; (3) that STAR's failure to show either the probability of Continental's achieving monopoly power, or Continental's intent to do so, was fatal to STAR's attempted monopoliza-

tion claim; (4) that exclusivity provisions are not illegal "tying agreements"; and (5) that Clayton Act § 3 is inapplicable to the sale of services (such as television programming).

Nothing in these five legal conclusions represents even a slight departure from well-settled law. Nor is this case one of first impression, despite STAR's effort to make it seem so, merely because cable television is involved. On its facts and in its legal analysis the Court of Appeals' decision is squarely in line with prior antitrust decisions of this Court and other federal courts.

a. Exclusivity provisions are not *per se* illegal.

STAR apparently still contends, as it did at trial and on appeal, that the challenged exclusivity provisions are *per se* illegal under Sherman Act § 1. Pet. 10-11. This contention is totally without merit. "Neither an exclusive dealing requirement nor a territorial sales solicitation requirement has ever been held by the Supreme Court to be a *per se* violation of the antitrust laws." *Bravman* v. *Bassett Furniture Industries, Inc.*, 552 F.2d 90, 101 (3d Cir.), *cert. denied*, 434 U.S. 823 (1977). On the contrary, the federal courts have repeatedly held that the validity of exclusive dealing arrangements under Sherman Act § 1 is governed by the Rule of Reason. *E.g., Savon Gas Stations Number Six, Inc.* v. *Shell Oil Co.*, 309 F.2d 306, 309 (4th Cir. 1962), *cert. denied*, 372 U.S. 911 (1963).[8]

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[8] *See also* Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 333 (1961); Donovan v. Pennsylvania Co., 199 U.S. 279 (1905); Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139, 147-148 (3d Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982); American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1246-50 (3d Cir. 1975); Smith v. Scrivner-Boogaart, Inc., 447 F.2d 1014, 1017 (10th Cir. 1971), *cert. denied*, 404 U.S. 1059 (1972); Export Liquor Sales, Inc. v. Ammex Warehouse Co., 426 F.2d 251, 252 (6th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 76 (9th Cir. 1969),

b. The plaintiff has the burden of proving the relevant market under Sherman Act § 2 as well as Sherman Act § 1.

The Court of Appeals held that STAR had failed to prove either a relevant geographic or relevant product market. 714 F.2d at 355-57; Pet. App. 6a-10a. STAR, in its petition to this Court, does not appear to contest this aspect of the Court of Appeals' decision. Instead, STAR contends, with respect to its Sherman Act § 2 claim, that as a matter of law it was not required to prove the relevant market. Pet. 9-10.

This contention has absolutely no basis in the law. It is an argument which has been consistently rejected by this Court and the lower federal courts. *E.g.*, *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965) ("Without a definition of . . . market there is no way to measure [defendant's] ability to lessen or destroy competition"); *Blanton* v. *Mobil Oil Corp.*, 1984-1 Trade Cas. (CCH) ¶ 65,765 at 67,143-67,144 (9th Cir. 1983); *Richter Concrete Corp.* v. *Hilltop Concrete Corp.*, 691 F.2d 818, 826-27 (6th Cir. 1982); *Dimmitt Agri Industries, Inc.* v. *CPC International, Inc.*, 679 F.2d 516, 525 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 1770 (1983); *In Re Municipal Bond Reporting Antitrust Litigation*, 672 F.2d 436, 441 (5th Cir. 1982); *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 117 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); *Nifty Foods Corp.* v. *Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 840 (2d Cir. 1980); *Moore* v. *Jas. H. Matthews & Co.*, 550 F.2d 1207, 1218-19 (9th Cir. 1977); *Coleman Motor Co.* v. *Chrysler Corp.*, 525 F.2d 1338 (3d Cir. 1975); *Sulmeyer* v. *Coca Cola Co.*, 515 F.2d 835, 850-51 (5th Cir.), *cert. denied*, 424 U.S. 934

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cert. denied, 396 U.S. 1062 (1970); Susser v. Carvel Corp., 332 F.2d 505, 516-517 (2d Cir. 1964); Parmelee Transp. Co. v. Keeshin, 292 F.2d 794 (7th Cir.), *cert. denied*, 368 U.S. 944 (1961).

(1975); *Mullis* v. *Arco Petroleum Corp.*, 502 F.2d 290, 295 (7th Cir. 1974); *Acme Precision Products, Inc.* v. *American Alloys Corp.*, 484 F.2d 1237 (8th Cir. 1973). All of these cases stand squarely for the proposition that the plaintiff in a Sherman Act § 2 case must prove the relevant market affected by the alleged violation.

None of the cases cited by STAR holds or suggests otherwise. In each case, the court found that the defendant possessed monopoly or near-monopoly market power — a finding that can be made only in the context of a defined relevant market.[9] For example, in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), Otter Tail had a monopoly in one market (electric power at the wholesale level) and was charged with using its monopoly power to control another market (retail electric power). In *United States* v. *Griffith*, 334 U.S. 100 (1948), and *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 (1944), the defendants were charged with using their monopoly power in certain motion picture exhibition markets to eliminate competition in other markets. In *Lorain Journal* v. *United States*, 342 U.S. 143 (1951), the defendant newspaper sought to retain its monopoly of a well-defined relevant market — "the mass dissemination of news and advertising, both of a local and national character" in the town of Lorain. *Id.* at 147. The three lower court cases relied on by STAR are equally inapposite. *See Gamco, Inc.* v. *Providence Fruit & Produce Building, Inc.*, 194 F.2d 484 (1st Cir.) (defendant's market building was a monopoly), *cert. denied*, 344 U.S.

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[9] *See, e.g.*, United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966) (the offense of monopoly consists in part of "the possession of monopoly power in the relevant market"); United States v. E.I. Dupont de Nemours & Co., 351 U.S. 377, 393 (1956) (illegal power "must be appraised in terms of the competitive market of the products"). STAR's description of cable television as a "natural monopoly" appears to be just another way of arguing that the relevant product market is cable television. There is absolutely no support in the record for such a narrow product market definition.

817 (1952); *American Federation of Tobacco Growers* v. *Neal*, 183 F.2d 869, 872 (4th Cir. 1950) (defendant monopolized auction sale of tobacco in Danville); *William Goldman Theatres, Inc.* v. *Loew's, Inc.*, 150 F.2d 738 (3d Cir. 1945) (defendant held a monopoly of first-run motion picture exhibition in Philadelphia).

c. Exclusive dealing arrangements are not tying arrangements.

The Court of Appeals rejected STAR's "tying" argument on the ground that Continental obviously did not offer, let alone "tie," two products or services. 714 F.2d at 358, n.14; Pet. App. 12a, n.14. This conclusion is fully supported by the record and fully consistent with decisions of this Court. *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 507 (1969); *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 614 (1953).

STAR does not deny that Continental offers only one service — cable television programming. STAR argues, however, that Continental "tied" the sale of its service to the non-sale of other competing pay television service. Pet. 13. The only authority cited by STAR in support of this position is one out-of-context half-sentence from *Northern Pacific Railway* v. *United States*, 356 U.S. 1 (1958). Pet. 13. This language is totally inapposite. It states simply that a tying arrangement may exist where the purchaser of the tying product "agrees that he will not purchase [the tied] product from any other supplier." 356 U.S. at 5-6. Nothing in the half-sentence cited by STAR, or in any other part of the *Northern Pacific* decision, or in any other case, even remotely suggests that a tie would exist if the seller in question were not a supplier of, or did not at least have a financial interest in, the sale of two distinct products.

d. Clayton Act § 3 does not apply to the sale of services.

The Court of Appeals affirmed the dismissal of STAR's Clayton Act § 3 claim, holding that Clayton Act § 3 does not apply to the sale of services such as the television programming offered by Continental. 714 F.2d at 358; Pet. App. 12a. STAR concedes in its petition that "television programming is not a commodity." Pet. 14. STAR argues, however, that the agreements between Continental and apartment owners were essentially agreements "for the installation of a cable TV system in their building," and were therefore analogous to "leases of machinery." *Id.*

This argument was presented to and specifically rejected by the Court of Appeals, which held "it is the programming that is by far the chief concern *of all parties to the transaction.*" 714 F.2d at 358; Pet. App. 12a (emphasis added). This holding is fully consistent with other federal court decisions in analogous cases. *E.g.*, *Aviation Specialties, Inc.* v. *United Technologies Corp.*, 568 F.2d 1186, 1191 (5th Cir. 1978) (holding aircraft repairs to be services even though substantial numbers of replacement parts were supplied during the repair process); *Hudson Valley Asbestos Corp.* v. *Tougher Heating & Plumbing Co.*, 510 F.2d 1140, 1144 (2d Cir.), *cert. denied*, 421 U.S. 1011 (1975) (holding an insulation contracting business to consist primarily of the service of covering pipes and ducts rather than the supply of insulation materials); *Kennedy Theater Ticket Service* v. *Ticketron, Inc.*, 342 F. Supp. 922, 927 (E.D. Pa. 1972) (holding that since the dominant purpose of a sale of a theater admission ticket "is not merely the purchase of the tangible admission ticket, but rather the contractual right to occupy a seat at an entertainment attraction," such tickets are not "commodities" within the meaning of the Clayton Act).

CONCLUSION

STAR has failed to present any "special or important reasons" for review on writ of certiorari in this case, S.Ct. R. 17, and has failed to establish any error in the decision of the Court of Appeals. STAR's petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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